

Decision 02-03-061

March 21, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND ELECTRIC
COMPANY for a Certificate of Public
Convenience and Necessity Authorizing the
Construction of the Northeast San Jose
Transmission Reinforcement Project.

Application 99-09-029
(Filed September 9, 1999)

**ORDER DENYING APPLICATIONS FOR REHEARING OF
DECISION 01-05-059 BY PROLOGIS LIMITED PARTNERSHIP-I AND
PROLOGIS TRUST; AND JOSEPH A. MCCARTHY AND MURIEL M. HARRIS,
AS TRUSTEES FOR THE RM TRUST AND THE MGM TRUST**

I. SUMMARY

By this Order, the Commission denies the applications for rehearing filed by Prologis Limited Partnership-I and Prologis Trust ("Prologis") and Joseph A. McCarthy and Muriel M. Harris, as Trustees for the RIM Trust and the MGM Trust ("McCarthy") of Decision 01-05-059 ("the Decision").¹ The Decision granted a Certificate of Public Convenience and Necessity ("CPCN") to build a new 7.3 mile double-circuit transmission line, upgrade certain transmission facilities, and construct a transmission/distribution substation serving the Northeast San Jose area.

Prologis and McCarthy challenge the Decision, primarily on grounds that it is inconsistent with the requirements of the California Environmental Quality Act

¹ Pacific Gas and Electric Company ("PG&E") also filed an application for rehearing of D.01-05-059, alleging that the Commission lacks jurisdiction to determine the need for the project and to set a cost cap for the project. PG&E's arguments have been incorporated by reference into a subsequent application for rehearing of Decision No. 01-12-017, filed with the Commission on January 17, 2002. In today's decision, we do not intend in any way to be disposing of the rehearing applications filed by PG&E or prejudging them. Those applications will be addressed in a subsequent decision.

(“CEQA”)². Both applicants object to the routing of the transmission line on their property, in the portion of the route referred to as the Southern Area. Prologis contends that portions of the proposed transmission line, between Mileposts 4.1 and 4.9 (the former Fremont Airport property), should have been undergrounded in order to protect wildlife and habitat, and argues that that undergrounding is a less expensive alternative. McCarthy maintains that portions of the transmission line route between Mileposts 4.7 and 5.6 (known as the “McCarthy Boulevard Alternative Segment”) should not have been designated the “environmentally superior alternative,” and argues that environmental impacts and economic feasibility were not adequately assessed in the Final Environmental Impact Report (“FEIR”) certified by the Commission. Both McCarthy and Prologis argue that the Decision was improper because they did not have an opportunity to comment upon additional cost information submitted by PG&E after the Decision was issued. We have considered the arguments of Prologis and McCarthy, and conclude that they are without merit. Therefore, the requests for rehearing by Prologis and McCarthy are denied.

II. BACKGROUND

On September 9, 1999, PG&E applied for a CPCN to build a 7.3 mile, 230 kilovolt (kV) double-circuit transmission line, upgrade certain other transmission facilities to accommodate and connect with the new line, and construct a transmission/distribution substation in Los Esteros to serve the Northeast San Jose area. The cost was estimated to be \$77,300,000. (PG&E Application at p. 6.) PG&E submitted a Proponents’ Environmental Assessment (“PEA”) for the Northeast San Jose Transmission Reinforcement Project (hereafter referred to as “the Project”), designating a proposed route with its Application. (Decision, Appendix A; PEA filed September 9, 1999.) Most of the project consists of a continuous transmission line extending south from PG&E’s existing Newark substation, to the new substation to be built in Los

² CEQA is found at California Public Resources Code, Division 13, § 21000, et seq.

Esteros. The facilities will be constructed in the cities of Fremont, Milpitas, San Jose and in an unincorporated area of Santa Clara County.

The Commission assumed the role of Lead Agency for the Project, and retained outside consultants to prepare the necessary environmental review documents. In addition to evaluating the environmental impacts of the project, the Commission also evaluated the need for and costs of the project. As the hearings on the matter progressed, it became clear that the routing of the transmission lines, undergrounding, and costs justification were to be key issues in the proceeding. The Draft EIR (DEIR) was issued in June of 2000, and public participation hearings were held in July of 2000. PG&E proposed a slight modification to the route originally designated in its application during closing arguments of the evidentiary hearings held in August and September 2000. (Decision at p. 6; see Appendix A, PG&E's original route, and Appendix B, PG&E's new proposed route.) Comments on the DEIR resulted in a change in the proposed route, necessitating the preparation of a Supplemental EIR (SDEIR) issued in October 2000 to evaluate the new route, including an analysis of the McCarthy Boulevard Alternative. Additional comments were received, and the FEIR was issued in February 2001. The FEIR found the new route to be the environmentally superior route. (Decision, Appendix C, environmentally superior route recommended in FEIR; FEIR: at ES-2, Section B ("Alternatives Analysis and Conclusions of Final EIR", B-1-B-35.)

With respect to the route selection and alternatives, the main environmental impacts studied in the environmental documents were biological, geological, recreation and land use, and visual impacts. Key among these impacts were bird mortality (from striking transmission lines), geological impacts (risk of liquefaction and lateral spreading) reduction of recreational experiences, and adverse effects on views in the area. The FEIR identified an "environmentally superior" route, which included the portions of the route now being challenged by McCarthy and Prologis. (Decision, Appendix C; FEIR: B-27-32.) The Decision adopted the environmentally superior route identified in the FEIR, concluded that there was a need for the project based on projected electricity demands in

the Silicon Valley area covered by the project, and approved the CPCN and certified the EIR.

Because this route and the substation location approved in the Decision differed from that originally proposed by PG&E, the Commission ordered PG&E to submit updated cost information. The parties were allowed an additional period to submit comments. PG&E submitted its new cost information on June 18, 2001. The cost estimate submitted by PG&E exceeded by over \$100 million the original estimate for the project, and the increase was largely unexplained. Thus, it became clear that further proceedings, including hearings and further briefing on the project costs, would be required. Due to the possibility that further hearings might lead to the selection of yet another route, the Commission stayed the Decision pending the further cost proceedings in D.01-08-064, issued August 27, 2001 (the “Stay Decision”). Hearings were conducted during September of 2001. The Commission also allowed further evidence regarding the need for the project in light of changed economic circumstances and new generation affecting the Silicon Valley. On December 12, 2001, the Commission issued D.01-12-017 (the “December Decision”), which lifted the stay and completed the approval process for PG&E’s proposed transmission line. The December Decision found that the project is still needed to ensure reliability and meet projected load demand in the region. It also found that PG&E failed to justify its cost claims, disallowed certain costs, and established a cost cap.

Applications for rehearing were timely filed by McCarthy, Prologis, and PG&E on June 18, 2001. On January 15, 2002, McCarthy filed an Application for Writ of Review before the California Supreme Court. At the Commission’s request, on February 6, 2002, the Court agreed to hold the writ application in abeyance pending the Commission’s disposition of the McCarthy’s application for rehearing.

III. DISCUSSION

A. Standing of Parties.

Public Utilities Code section 1731 provides that only a “party to the proceeding . . . or other party pecuniarily interested in the public utility affected may

apply for a rehearing.” (Public Utilities Code § 1731.) We note that Prologis became a party early on by intervening in the proceeding. (Decision at p. 6; see Protest and Request for Hearing filed by Prologis on October 25, 1999.) Thus, Prologis has standing to file an application for rehearing with the Commission.

McCarthy was not a party at the time the Decision was issued (May 17, 2001) or when it filed this application for rehearing (June 18, 2001). However, McCarthy was made a party during the hearings on cost issues, on August 7, 2001³ and previously had participated in the CEQA process by filing comments on the SDEIR with the Commission on November 27, 2000.

We conclude that McCarthy was not a party to this proceeding at the time the instant application for rehearing was filed, and thus lacks standing to file this application for rehearing. However, because of McCarthy’s particular interest in the environmental issues presented, we will address McCarthy’s arguments on their merits. (See, *Application of Wild Goose Storage, Inc.* (1997) [D.97-10-070] 76 Cal.P.U.C.2d 246, 247-48.)

B. Application for Rehearing Filed by McCarthy.

(1) Cost issues.

McCarthy contends that the Commission did not consider and review final costs estimates prior to project approval, as required under Public Utilities Code section 1003(c) and General Order 131-D. (McCarthy Application at p. 3, 5.) Section 1003(c) requires the Commission to consider appropriate costs estimates and that this information be included with applications for the construction of transmission lines. General Order 131-D authorizes the Commission to review cost information and to notify the utility and require additional cost information where there are deficiencies in the data. The Commission followed both of these requirements.

³ At that time, the Administrative Law Judge granted McCarthy party status as to issues arising from that date forward. (Decision at p. 7, fn.10; Aug. 7, 2001 Hearing Transcript at p. 64.) Prior to that time, McCarthy had been on the service list for “information only” purposes.

PG&E included a cost estimate for the project at the time the Application was filed, estimating project cost to be \$77,300,000. (PG&E's Application, p. 6.) Because the Decision approved a route different from any route PG&E had costed out, PG&E was ordered to submit an updated route-specific estimate, and to improve the overall quality and detail of information. (Decision at p. 4, 20-21, 29, 89.) Although the Project was approved in the Decision, the Decision was not effective until the additional cost information was submitted, and the Commission retained discretion to make necessary revisions after reviewing the new cost information. (Decision at pp. 33, 89-90.) McCarthy and other parties were given additional time for comment, and participated in the hearings on cost. After reviewing PG&E's updated cost information and holding further hearings, the Commission ultimately disallowed many of PG&E's costs and set a cost cap on the project in the December Decision. (December Decision at pp. 8-11.) PG&E's revised cost information estimated the project would cost \$182.9 million; the December Decision disallowed \$35,357,445 in unjustified costs, and set a cost cap at \$147,542,555. (December Decision at pp. 2, 9.) The Commission also retained jurisdiction to conduct a reasonableness review in the future. (December Decision at p. 11.)

McCarthy argues that because the Decision approved the project, but did not become effective until cost information is submitted, it will not have an opportunity to provide meaningful comments on the additional cost estimates submitted by PG&E, nor will they be able to address the Commission's findings on the cost cap. (McCarthy Application at p. 4.) McCarthy's objections as to the adequacy of PG&E's cost information and its ability to comment on costs have been addressed by the Commission, and are moot as a result of the subsequent hearings on cost held in August and September of 2001. Therefore, we conclude that the Decision adequately addressed cost issues by reviewing cost information, requiring updated information, holding additional hearings and issuing the December Decision.

McCarthy further argues that the placement of overhead transmission lines along the McCarthy Boulevard Alternative will diminish its property value, and increase

the overall cost of the project due to need to purchase private land and to pay damages for exposure to EMFs, and loss of aesthetic value. (McCarthy Application at pp. 5-7.) The Commission considered these claims and found no credible evidence to support a decline in Silicon Valley property values would result from EMF or visual impacts of the project. (Decision at p. 69.) Moreover, this argument is not relevant to the Commission's obligations under CEQA. Economic or social impacts of a project are not considered significant environmental impacts. (CEQA Guidelines § 15382⁴.) Economic impacts are relevant only if they cause a physical change in the environment. (CEQA § 21060.5; CEQA Guidelines §§ 15064, 15131.) We conclude that McCarthy's claims regarding property depreciation are unsubstantiated, and are not relevant to the Commission's selection of the environmentally superior route.

(2) Environmental issues.

McCarthy alleges that the Decision certified the EIR prior to addressing environmental impacts of the project. (McCarthy Application, p. 8.) This is simply not true. At the time the Decision was issued, the Commission had prepared a Draft, Supplemental and Final EIRs in full compliance with CEQA. The Commission's own rules state that we must comply with CEQA. (California Public Utilities Commission's Rules of Practice and Procedure, Cal. Code Regs., tit. 20, Rule 17.1 (hereafter "Commission Rules".) In adopting the environmentally superior alternative, the Decision gave great deference to the findings in the EIR documents, which carefully considered 22 different proposed routes. (Decision at p. 2-3, 35, 46-50; SDEIR: A-10; Section C, "Impact Analysis" at C-46-55; FEIR: B-1-B-35.)

McCarthy argues that the Decision fails to adequately assess the economic feasibility of the McCarthy Boulevard Alternative. (McCarthy Application, p. 10.) The Decision determined that there was a need for the project in order to meet the demand for the project in the northeast San Jose Area. (Decision at p. 13; see also December

⁴ The CEQA Guidelines are found at Cal. Code Regs., tit. 14, § 15000, et seq., and are referred to herein as "CEQA Guidelines."

Decision at pp. 3, 22.) In addition, the Commission carefully reviewed cost information, required additional cost information, held additional hearings on cost, disallowed some costs and set a cost cap for the project. Thus, the Decision adequately addresses economic feasibility.

McCarthy maintains that the Decision fails to ensure appropriate EMF mitigation measures prior to project approval. (McCarthy Application at pp. 10-12.) Potential impacts from EMFs on nearby business and proposed mitigation measures are discussed in the Decision. (Decision at pp. 59-64.) The FEIR concludes that there is presently no scientifically established cause and effect relationship between EMF exposure and health effects. (FEIR: ES-18.) The main impact of EMFs is interference with computer monitors, which were determined to be significant, but mitigable impacts. (FEIR: ES-15.) PG&E has proposed numerous mitigation measures for EMFs, including raising the transmission towers. The Commission required PG&E to submit a detailed mitigation plan prior to the construction of the project as a condition of project approval, and expressly retained jurisdiction to assess whether the mitigation proposal reduces EMF exposure adequately without creating new adverse environmental impacts. (Decision at p. 59-60; 65; 72-73.) The mitigation measures are set forth in the FEIR and include procedures for PG&E to respond to complaints of interference from EMFs. (FEIR, Section C, C-31, Mitigation Measure PS-2.) The process for implementation of the recommended mitigation measures is contained in the Mitigation, Monitoring, Compliance and Reporting Program, which will be overseen by the Commission. (Decision at p. 74.)

Finally, McCarthy Applicants contend that the McCarthy Boulevard Alternative is not the environmentally superior route, arguing that this conclusion in the Decision is no more than a “bare conclusion, unsupported by fact.” (McCarthy Application, p. 10, 12-13.) The selection of route was a major point of contention, and the various proposed routes were thoroughly discussed in the Decision. (Decision, pp. 38-53.) The DEIR, considered 22 different alternative routes, six of which were analyzed in detail in the SDEIR; additional combinations of alternatives and variations were

analyzed in the FEIR. (Decision at p. 38, DEIR Section C.5; SDEIR: 10, Section B, “Alternatives Description” and Section D, “Comparison of Alternatives”; FEIR, Section F, “Alternatives Analysis and Conclusions.”) The Decision is based on the FEIR’s conclusion after comparing and analyzing all alternatives proposed that the McCarthy Boulevard Alternative is environmentally superior to the other routes. (SDEIR: 75; FEIR: B-13.)

The FEIR concludes that some environmental impacts, including bird collisions with overhead lines and towers, are a significant but unmitigable impact. (Decision at p. 39.) Nevertheless, mitigations are proposed to reduce the impact, and the selected route would result in far less severe biological risks compared to the other proposed routes. (FEIR: B-27, B-30; SDEIR: 70, Table C-5, Mitigation Measure B-9.) CEQA provides that where a significant environmental impact cannot be avoided, a Statement of Overriding Consideration may be prepared, indicating that economic, social, technological or other benefits outweigh the significant effects on the environment. (CEQA Guidelines § 15093; CEQA 21081(b).) The Decision contains such a statement, and concludes that the significant environmental impacts from the project have been mitigated to the extent feasible. The Decision found that the benefits of the project, including the provision of electrical supply and increased reliability to the Cities of San Jose, Santa Clara, and Milpitas, outweigh the potential impacts of the project. (Decision at pp. 73-75.)

The McCarthy Boulevard Alternative was selected to avoid significant and unmitigable impacts of PG&E’s original proposed route, including avoiding the salt pond, reducing bird collisions, reducing visual and recreational impacts, and minimizing impacts on the Pacific Commons Preserve. (Decision at p. 46.) The McCarthy Boulevard Alternative would also avoid the Santa Clara Valley Water District Coyote Creek Flood Protection Facility, known to be used by migratory water birds, and the main flight path of the great blue heron rookery (SDEIR: 46; FEIR: B-27, 30; Decision at p. 46-48). The FEIR concluded that bird strikes were potentially significant, but would be less frequent with the McCarthy Alternative than other routes. (FEIR: B-14-18, B-27, B-

30.) It recommended mitigation measures (SDEIR: 70, Table C-5, Mitigation Measure B-9); and project-specific mitigation measures for bird collisions, to be monitored for a minimum of three years in order to study their effectiveness. (See SDEIR pp. 68-70.) Finally, the route would avoid areas of unstable geological conditions, and minimizes recreational impacts on the Bay Trail and McCarthy Ranch (Decision at pp. 50-51; FEIR B-10, B-14, B-25-27).

Despite this extensive analysis of the McCarthy Boulevard Alternative in the SDEIR, McCarthy suggests that absent more specific evidence with respect to the sustainability of specific bird populations affected, the Decision violates CEQA. (McCarthy Application at p. 12. This argument is without merit. The Decision relies upon the factual analysis and conclusions drawn in the FEIR. Under the substantial evidence standard, the Decision must be based on relevant and reasonable information, such that there is a “fair argument” to support the Commission’s conclusions, even though other conclusions may have been reached. (CEQA Guidelines, § 15384(a); *Laurel Heights Improvement Assoc. of San Francisco v. Regents of the Univ. of Calif.* (1988) 47 Cal.3d 376, 393.) Moreover, there is evidence in the FEIR does discuss the particular bird species affected. The analysis in an EIR need not be exhaustive, but rather is designed to be an informative document containing enough detail to indicate the reasons for conclusions drawn by the Commission. (CEQA Guidelines 15151; *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 413.)

McCarthy Applicants conclude by arguing that the Decision “either did not address or made determinations absent evidence” of numerous environmental impacts. These alleged deficiencies are further outlined in McCarthy’s Comments on the SDEIR, filed November 27, 2000, and include the following areas: the effect of EMFs, effect on land use, and public recreation, noise and vibration, socioeconomic and public services, visual and biological resources; air quality, traffic and transportation. (McCarthy Application, p. 13, Exhibit A, Comments on SDEIR.) The Commission has considered these comments, and provided a good faith and reasonable response, as required by CEQA. (CEQA Guidelines 15088; See FEIR: p. E-66, Comments Set Q: McCarthy

Ranch .) Because we have already considered and responded to additional environmental impacts raised by McCarthy, we conclude that there is substantial evidence for the Decision.

C. Application for Rehearing by Prologis.

(1) Cost Issues

Prologis maintains that undergrounding the project from Mileposts 4.1 to 4.9 will be a cheaper alternative, because the construction of overhead lines will require PG&E to spend additional sums of money to purchase above ground right of ways of the affected property. (Prologis Application, pp. 7-9.) This argument is incorrect. First, undergrounding is significantly more expensive due to the increased time and labor involved. (Decision at p. 46.) Second, the Commission found that there is no evidence to support the argument that the need to purchase right of ways would drive up project costs. (Decision at pp. 32-46.) Utilities typically install transmission lines along public streets and highways. Utilities are not required to pay for public right of ways because they are granted a franchise to use property in exchange for providing electrical service. (Public Utilities Code § 6001; Decision at p. 32.) Finally, the Commission is not obligated under CEQA to choose the least expensive alternative. Under CEQA, costs of an alternative are only relevant if they render the project infeasible. A project is infeasible only if additional costs are so severe as to render it impractical to proceed with the project. *Citizens of Goleta v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181. There has been no demonstration that the selected route is infeasible.

Prologis also argues that it will not have an opportunity to review the PG&E's revised cost estimates, since they were to be submitted after the Decision was issued. (Prologis Application at p. 7). As discussed in Section III.B., (1) with respect to the same argument made by McCarthy, this point is moot. Prologis had the opportunity to comment upon PG&E's cost estimate, and participated in hearings held on PG&E's revised cost estimates.

(2) Environmental Issues.

Prologis contends that there is no support for the use of overhead lines rather than undergrounding the project in the area of Mileposts 4.1 to 4.9 of the Southern Area. (This area is identifiable on the maps as the former Fremont Airport property). (Prologis Application at p. 6.) To the contrary, the Decision was based on the recommendations in the FEIR. The FEIR recommended the McCarthy Boulevard Alternative, along with portions of PG&E's proposed route as the environmentally superior route for the Southern Area. The FEIR did not support either the Southern Area Alternative or the Overhead Variation to the Southern Alternative (beginning at Milepost 4.1) over PG&E's proposed route. (Decision at pp. 46-50.) This conclusion was based on findings in the FEIR that the selected combination would avoid high bird use areas, unstable geologic conditions, and minimize recreation and land use impacts in the area. (Decision at p. 50.) More specifically, the selected route would avoid construction difficulties and geological risks (soil liquefaction) associated with crossing the Coyote Creek and would reduce bird collisions because it is located further from high use bird areas. (See FEIR, Section B.2, B-26-27, Table B-1; B-31, Table B-5.) An all-underground alternative was analyzed in the Draft EIR but was rejected in favor of the route selected by the Commission. (Decision at p. 83.) Thus, the Decision is supported by substantial evidence.

Prologis also maintains undergrounding between Mileposts 4.1 to 4.9 should have been required because development of the area is planned in the future, and a nearby Wildlife Refuge will be expanded by the U.S. Fish and Wildlife Service in order to protect the salt harvest mouse and burrowing owls. (Prologis Application at p. 1.) Overhead transmission lines would pose a threat to these species by creating perching points for birds of prey. (Prologis Application at p. 2.) In addition, Prologis contends that bird mortality will increase from impacts with the overhead lines. (Prologis Application, pp. 2-3.) These arguments are addressed in the Decision and environmental documents.

For example, the SDEIR recommended that either undergrounding be extended through the Fremont Airport parcel, or perch preventers be installed to eliminate potential habitat loss and predation impacts on the burrowing owl and salt marsh harvest mouse. (FEIR: 2, Table ES-1; p. 62, Mitigation Measure B-8.) Measure B-8 would protect the salt marsh harvest mouse by creating tubular towers and bird guards to minimize bird perching and predation opportunities, and would create artificial burrows to protect burrowing owls. (FEIR: C-4, Table C-1, Mitigation Measure B-8). Mitigation Measure B-9 recommends installing bird diverters to reduce bird collisions. (FEIR: C-4, Table C-1, Mitigation Measure B-9.) Still, bird collisions were considered to be a potential, but unavoidable impact. (Decision at p. 49, 74.) However, the FEIR concluded that the other proposed alternatives were not preferable due to the “greater magnitude of impacts in nearly every non-biological environmental discipline,” and the fact that the most frequently used bird use area was eliminated by the use of McCarthy Boulevard Alternative. (FEIR: B-32.) Prologis argues that despite the increased mitigation measures, bird predation of the California clapper rail, tri-colored blackbird, and the salt harvest mouse, will not be “entirely” eliminated. (Prologis Application at pp. 3-4.) While the proposed mitigation measures may not eradicate all environmental impacts, they are designed to effectively mitigate the impacts to the extent feasible, as required by CEQA. As to the significant impacts that could not be avoided or eliminated, the Commission adopted a statement of overriding considerations, based on the need for the project to provide electrical service in the San Jose Area. (Decision at pp. 73-75.) Thus, the Decision not to extend undergrounding between Mileposts 4.1 to 4.9 is supported by substantial evidence in the record.

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IV. CONCLUSION

For the reasons stated above, there is no legal error in the Decision. Therefore, the applications for rehearing by Prologis and McCarthy are denied.

Therefore, **IT IS ORDERED** that:

1. The application for rehearing by Prologis is denied.
2. The application for rehearing by McCarthy is denied.

This proceeding is closed.

This order is effective today.

Dated: March 21, 2002 at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners